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Albert A. Ehrenzweig

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Contractual Capacity of Married Women and Infants in the Conflict of Laws

In this Article the author briefly examines the choice-of-law rules governing the validity of contracts entered into by married women and infants. He concludes that while the rules have been confusing and their application uncertain, the cases reveal that courts have generally held the contracts to be valid and enforceable if valid in any state which has a sufficient contact with the parties or the contract.

Albert A. Ehrenzweig*

THE conflicts law of contracts is generally accused of being "the most confused subject in the field of Conflict of Laws."¹ In a series of articles I have tried to show, however, that the decisions of the courts in this field have in fact been quite consistent and rational if analyzed in the light of the courts' actual doing rather than of their dogmatic language.² To be sure, the "first principles of legal thinking,"³ as embodied in the traditional rules of the *lex contractus*, the *lex solutionis*, the implied intention, and the center of gravity, hardly enable the lawyer to predict the outcome of his case. But the analysis, suggested by Walter Wheeler Cook, of small groups of cases and problems,⁴ leads, I believe, to a very

* Walter Perry Johnson Professor of Law, University of California, Berkeley.

1. For quotations from Beale, Goodrich, Lorenzen, and casebooks, see Morris, *The Eclipse of the Lex Loci Solutionis—A Fallacy Exploded*, 6 VAND. L. REV. 505 (1953). See also STUMBERG, CONFLICT OF LAWS 224 (2d ed. 1951). See generally SELECTED READINGS ON THE CONFLICT OF LAWS 695 (1956); see particularly Lorenzen, *The Validity and Effect of Contracts in the Conflict of Laws* pts. 2, 3, 30 YALE L.J. 565, 31 YALE L.J. 53 (1921); Nussbaum, *Conflict Theories of Contracts*, 51 YALE L.J. 893 (1942).

2. Ehrenzweig, *The Real Estate Broker in the Conflict of Laws*, 59 COLUM. L. REV. 303 (1959); Ehrenzweig, *The Statute of Frauds in the Conflict of Laws* (to be published); Ehrenzweig, *Contracts in the Conflict of Laws: The Basic Rule of Validation* (to be published).

3. *Mutual Life Ins. Co. v. Liebong*, 259 U.S. 209 (1922) (opinion of Holmes, J.). See EHRENZWEIG, CONFLICT OF LAWS 11, 13 (1959).

4. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 431 (1949). See also Reese, *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 U. CHL. L. REV. 339 (1952).

simple and rational conclusion: Equal parties to a contract⁵ intend to be bound. Their agreement will therefore quite usually be upheld as against claims of invalidity based on either the forum or a foreign law, if another "properly" applicable law supports this decision. The few exceptions to this Basic Rule of Validation are subject to specific analysis and enumeration. The question whether the defense of incapacity constitutes such an exception will be examined in this Article.

An agreement purportedly entered into by a person physically incapable of forming the intention to be bound may be held invalid as lacking consent, an essential element of a valid contract.⁶ Any court will feel free so to hold without regard to any foreign law that may otherwise be said to "govern" that agreement. Technical problems of conflicts law can arise only in two situations. In the first place, a claim of invalidity or validity may be based on a court decree purporting to deprive a person of, or to endow him with, capacity to act with legal effect. In this case the conflicts problem is one concerning the effect of a judgment with which I have dealt elsewhere.⁷ And secondly, the claim of invalidity may be based on a law which deprives certain categories of persons of their legal capacity without regard to their individual state of mind and intellect. Such laws typically concern married women and persons below a certain age. At all times, in all countries, the question has been raised whether such incapacities should follow such persons outside the state which has "created" the incapacity. When feudalism postulated an exclusive regime of the *lex situs*, it remained doubtful whether this regime also excluded consideration of the foreigner's own "personal" law of capacity. Was a married woman, a child, a mentally defective person able to bind himself in a transaction concerning forum land because he was capable to do so under the law of his home state though not under the law of the forum? Was he incapacitated by his personal law though capable under the *lex fori*? Notwithstanding opinions to the contrary, the continental theory to this day has in substance adhered to the rule that a person's capacity in both cases is determined by his "personal law."⁸

Story shared the feudalist preoccupation with this problem.⁹

5. As to contracts between unequal partners, see Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953).

6. See, e.g., *Guidici v. Guidici*, 2 Cal. 2d 497, 41 P.2d 932 (1935) (incapacity to contract in Nevada because of intoxication).

7. EHRENZWEIG, *CONFLICT OF LAWS* 185-88 (1959).

8. 1 RABEL, *CONFLICT OF LAWS* 173-88 (2d ed. 1959). BATIFFOL, *DROIT INTERNATIONAL PRIVE* 452 *passim* (3d ed. 1959). But see, for recent tendencies to the contrary, Drobnič, *Comment*, 5 AM. J. COMP. L. 487, 489 (1956).

9. More than one-tenth of the first edition, STORY, *CONFLICT OF LAWS* (1834), is devoted to this problem.

But while trying to do justice to continental doctrine, he pleaded, on grounds of convenience and equity, for the application of the law of the contract.¹⁰ For, he asked, "how are the inhabitants of any country to ascertain the condition of such persons by the law of a foreign country, or the law of the domicile of his origin?"¹¹ We shall agree with his rejection of the personal law. But there remains the question why a contract should be held invalid under the law of the place of contracting in cases in which the person lacking capacity to contract under that law did have such capacity under his own law. Only a hopelessly doctrinaire search for general principles can explain this result.

Leaving aside possible findings of physical incapacity which as stated above are independent from the applicable law, no reason is apparent at the outset why (except of course for a possible coercive application of forum law on policy grounds) an agreement involving a minor or a married woman should not be subject to the general Rule of Validation. No reason is apparent why such an agreement should not be held valid in accordance with the parties' intention, under either the *lex fori* or any other law having a substantial contact with the agreement. And, indeed, were it not for a complex history of the problem reaching into a distant feudal past, and the more recent dogmatic deviation of our conflicts law,¹² no court would doubt that the Rule of Validation is the law. Analysis of the case law governing contracts of married women and infants supports this proposition.

Married women

The only decision of the United States Supreme Court, *Union Trust Co. v. Grosman*,¹³ is to the contrary. A guaranty executed in Illinois by a Texas married woman was held unenforceable in Texas under Texas law notwithstanding its enforceability under the law of Illinois. But the case was decided almost half a century ago, and being based on a fast disappearing attitude toward women's rights and obligations, should, at least outside Texas, cease to be relied on as authority.¹⁴ No longer can it be considered "extravagant to suppose that the courts [of the state of the woman's domicile] will help a married woman to make her property there liable in circumstances in which the local law says that it shall be free,

10. *Id.* at 97.

11. *Id.* at 74.

12. See EHRENZWEIG, *CONFLICT OF LAWS* 8-13 (1959). For what is probably the most thorough and discriminating analysis of American, English, French and Scottish case law, see Smith, *Capacity in the Conflict of Laws: A Comparative Study*, 1 INT'L & COMP. L.Q. 446 (1952).

13. 245 U.S. 412 (1918).

14. But see, e.g., *King v. Bruce*, 145 Tex. 647, 201 S.W.2d 803, cert. denied, 332 U.S. 769 (1947). See also *Teas v. Kimball*, 257 F.2d 817 (5th Cir. 1958).

simply by stepping across a state line long enough to contract."¹⁵ Indeed, most courts which are still saddled with the medieval immunity rule of the common law, will be quite willing to commit this "extravagance." They will be more concerned with the unjustifiable hardship that, in this commercial and mobile age, would otherwise be imposed on those dealing abroad with women with hidden contractual incapacities.¹⁶ Mr. Justice Holmes conceded in the *Grosman* case that the forum has "no duty to protect under its own law women who would not have been protected under their domiciliary law."¹⁷ By the same token the state of the woman's domicile should not extend its protection to foreign transactions at the expense of unwary citizens of other states.¹⁸

In contrast to the theory underlying the *Grosman* case, American courts have, therefore, in the vast majority of decided cases, in effect upheld the contracts of married women, without regard to invalidating laws of the forum,¹⁹ of the place of contracting,²⁰ or of the domicile. They have done so by resort either to their own law,²¹ to the law of the situs,²² the law of the domicile,²³ or the law of the contract.²⁴

15. 245 U.S. at 416.

16. See *Chemical Nat'l Bank v. Kellogg*, 183 N.Y. 92, 75 N.E. 1103 (1905) (since defendant's endorsement gave no notice which would put a purchaser on guard, defendant was estopped from claiming that her endorsement was a New Jersey contract and therefore void). See generally EHRENZWEIG, *CONFLICT OF LAWS* 20 (1959).

17. 245 U.S. at 417.

18. See 15 FLA. L.J. 268, 269 (1941), pleading against the right of "a married woman to avoid payment of a debt which was valid and enforceable when made merely by becoming domiciled in Florida." See also note 30 *infra*.

19. See note 26 *infra*.

20. But see RESTATEMENT, *CONFLICT OF LAWS* § 333 (1934). For criticism see COOK, *THE LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS* 433, 440-41 (1942).

21. *Connor v. Elliott*, 79 Fla. 513, 85 So. 164 (1920) (also situs); *Thomson v. Kyle*, 39 Fla. 582, 23 So. 12 (1897) (same); *Peretzman v. Borochoff*, 58 Ga. App. 838, 200 S.E. 331 (1938); *Halley v. Ball*, 66 Ill. 250 (1872); *Southern Cotton Oil Co. v. Gober*, 192 Miss. 729, 6 So. 2d 919 (1942); *Johnston v. Gawtry*, 83 Mo. 339 (1884); *Chemical Nat'l Bank v. Kellogg*, 183 N.Y. 92, 75 N.E. 1103 (1905); *Voigt v. Brown*, 42 Hun. 394 (N.Y. Sup. Ct. 1886); *Poole v. Perkins*, 126 Va. 331, 101 S.E. 240 (1919). See generally Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958); Heilman, *Treatment of Capacity To Contract in Conflict of Laws Cases*, 32 W. Va. L.Q. 102 (1926); Comment, 27 YALE L.J. 816 (1918).

22. See, e.g., *Post v. First Nat'l Bank*, 138 Ill. 559, 28 N.E. 978 (1891).

23. *Freret v. Taylor*, 119 La. 307, 44 So. 26 (1907). "[I]t is not the duty of the states in which . . . parties may chance to temporarily sojourn to safeguard their rights . . . in a manner . . . different from what is provided for in the state of their domicile." *Id.* at 314, 44 So. at 27. See also *Baer v. Terry*, 108 La. 597, 32 So. 353 (1902).

24. *Coxe v. Coxe*, 21 Del. Ch. 30, 180 Atl. 612 (Ch. 1935); *Meier & Frank Co. v. Bruce*, 30 Idaho 732, 168 Pac. 5 (1917); *Robison v. Pease*, 28 Ind. App. 610, 63 N.E. 479 (1902); *Moody v. Barker*, 188 Ky. 401, 222 S.W. 89 (1920); *R. S. Barbee & Co. v. Bevins, Hopkins & Co.*, 176 Ky. 113, 195 S.W. 154 (1917); *Char-*

The few isolated cases which have invalidated contracts of married women which could have been upheld under either forum or foreign law, can usually be explained on special grounds. Most of these cases are an expression of a vanishing land taboo,²⁵ and even as to forum land some courts have found it possible to uphold contracts valid under a foreign law notwithstanding a forum law to the contrary.²⁶ The peculiar use of *renvoi* in *University of Chicago v. Dater*,²⁷ which applied an invalidating forum law even as against a validating law of the situs, is probably no longer authority.²⁸ The remaining cases which insist on invalidation under a law allegedly applicable *proprio vigore* are either nearly or more than half a century old,²⁹ or limited to a few jurisdictions which apparently continue to maintain the inequality of sexes.³⁰ But in all other

ney v. Charney, 316 Mass. 580, 55 N.E.2d 917 (1944); Polson v. Stewart, 167 Mass. 211, 45 N.E. 737 (1897); Milliken v. Pratt, 125 Mass. 374 (1878); House v. Lefebvre, 303 Mich. 207, 6 N.W.2d 487 (1942); Ohio *ex rel.* Fulton v. Purse, 273 Mich. 502, 263 N.W. 872 (1935); Phoenix Mut. Life Ins. Co. v. Simons, 52 Mo. App. 357 (1893); Farmers State Bank v. Butler, 101 Neb. 635, 164 N.W. 562 (1917); Proctor v. Frost, 89 N.H. 304, 197 Atl. 813 (1938); Hill v. Pine River Bank, 45 N.H. 300 (1864); Mayer v. Roche, 77 N.J.L. 681, 75 Atl. 235 (Ct. Err. & App. 1909); Law v. Smith, 68 N.J. Eq. 81, 59 Atl. 327 (Ch. 1904); National Exch. Bank v. Rook Granite Co., 155 N.C. 43, 70 S.E. 1002 (1911); Federal Corp. v. Dettelbach, 125 Pa. Super. 437, 189 Atl. 492 (1937); Robinson v. Queen, 87 Tenn. 445, 11 S.W. 38 (1889); International Harvester Co. of America v. McAdam, 142 Wis. 114, 124 N.W. 1042 (1910). See also Bowles v. Field, 78 Fed. 742 (C.C.D. Ind. 1897); Connecticut Mut. Life Ins. Co. v. Westervelt, 52 Conn. 586 (1879); Freret v. Taylor, 119 La. 307, 44 So. 26 (1907); Marks v. Germania Sav. Bank, 110 La. 659, 34 So. 725 (1903); Bank of Louisiana v. Williams, 46 Miss. 618, 629 (1872); Wright v. Remington, 41 N.J.L. 48 (Super. Ct. 1879).

25. EHRENZWEIG, CONFLICT OF LAWS 45, 59, 190, 206-09, 270 (1959). See, e.g., Swank v. Hufnagle, 111 Ind. 453, 13 N.E. 105 (1887) (forum land); Smith v. Ingram, 130 N.C. 100, 40 S.E. 984 (1902); Evans v. Beaver, 50 Ohio St. 190, 33 N.E. 643 (1893) (foreign mortgage); Taylor v. Leonard, 275 S.W. 134 (Tex. Civ. App. 1925) (forum land). See also Myers v. Steenberg, 206 Ala. 457, 90 So. 302 (1921); Hayden v. Stone, 13 R.I. 106 (1880), distinguished as involving the "remedy" in Brown v. Browning, 15 R.I. 422 (1886).

26. Proctor v. Frost, 89 N.H. 304, 197 Atl. 813 (1938). See also Polson v. Stewart, 167 Mass. 211, 45 N.E. 737 (1897); Merrielles v. State Bank, 5 Tex. Civ. App. 483, 24 S.W. 564 (1893).

27. 227 Mich. 658, 270 N.W. 175 (1936).

28. See House v. Lefebvre, 303 Mich. 207, 6 N.W.2d 487 (1942). On *renvoi* see generally Ehrenzweig, Book Review, 8 AM. J. COMP. L. — (1959).

29. Freeman's Appeal, 68 Conn. 533, 37 Atl. 420 (1897); Burr v. Beckler, 264 Ill. 230, 106 N.E. 206 (1914); Nichols & Shepard Co. v. Marshall, 108 Iowa 518, 79 N.W. 282 (1899); Union Trust Co. v. Knabe, 122 Md. 584, 89 Atl. 1106 (1914); Union Nat'l Bank v. Chapman, 169 N.Y. 538, 62 N.E. 672 (1902) (disent properly pointing out that "the law presumes a lawful, and not an unlawful, intent [and] . . . that she intended the note should be used in a state where she could become . . . a surety," *id.* at 547, 62 N.E. at 674); Armstrong, Cator & Co. v. Best, 112 N.C. 59, 17 S.E. 14 (1893).

30. See, e.g., Kellogg-Citizens Nat'l Bank v. Felton, 145 Fla. 68, 199 So. 50 (1940) (*but see* note 18 *supra*); Ulman, Magill & Jordan Woolen Co. v. Magill, 155 Ga. 555, 117 S.E. 657 (1923) (would even apply the *lex fori* as such); Sally v. Bank of Union, 150 Ga. 281, 103 S.E. 460 (1920); Griswold v. Golding, 8 Ky.

jurisdictions, in this field, too, the Basic Rule of Validation is entitled to express recognition.

Infants

"At common law a male infant attains his majority when he becomes 21 years of age and all unexecuted contracts made by him before that date, except for necessities, while not absolutely void are voidable at his election."³¹ Where statutes either change the period of infancy or its legal consequences, conflicts of laws may arise which, in the field of contracts, may require a choice between the Rule of Validation and a state's interest in protecting its infants against the consequences of their acts.

To Story the only issue was between the interest and law of the infant's domicile of origin and those of his domicile at the time of the transaction.³² Giving preference to the former, he seems to approve of the "faintly comic doctrine"³³ that "each state is presumed to be the best capable of judging, from the physical circumstances of climate and otherwise, when the faculties of its citizens are morally or civilly perfect for the purposes of society."³⁴ But what we are concerned with today is only whether we should give greater protection to persons who, having acted under one law as if they had reached majority, conveniently claim an incapacity under another law, or to those dealing with them in reliance on the law of the transaction. The answer to this question can hardly be doubtful under present economic conditions. Either the forum law of the transaction³⁵ or the foreign law of domicile or contract or forum law as such³⁶ will be applied in order to validate a contract of a person claiming infancy under another law, unless the forum prefers its own invalidating law to protect its own citizens³⁷ against any transactions entered into under a validating law.³⁸ Whether or not a court

L. Rep. 777, 3 S.W. 535 (Ct. App. 1887) (*but see* note 24 *supra*); Marks v. Loowenberg, 143 La. 196, 78 So. 444 (1918) (but decided in a civil law jurisdiction); Greenlee v. Hardin, 157 Miss. 229, 127 So. 777 (1930); Bramwell v. Conquest, 2 S.W.2d 995 (Tex. Civ. App. 1928).

31. International Text Book Co. v. Connelly, 206 N.Y. 188, 99 N.E. 722, 725 (1912).

32. STORY, CONFLICT OF LAWS 50 *passim* (1834).

33. Smith, *supra* note 12, at 453.

34. STORY, CONFLICT OF LAWS 70 (1834).

35. Carmen v. Fox Film Corp., 269 Fed. 928 (2d Cir. 1920), *cert. denied*, 255 U.S. 569 (1921) (forum contract upheld against foreign minor claiming invalidity under forum law, with reference to unclean hands).

36. Thompson v. Ketcham, 8 Johns. R. 190 (N.Y. Sup. Ct. 1811) (Jamaica law of the contract held not proved).

37. *But see* as to noncitizens Carmen v. Fox Film Corp., *supra* note 35.

38. International Text Book Co. v. Connelly, 206 N.Y. 188, 99 N.E. 722 (1912); Marx v. Hefner, 46 Okla. 453, 149 Pac. 207 (1915) (possibly invalidating laws of contract and domicile not pleaded). This policy may even apply as against foreign

is to follow the latter practice should be determined by a conscious choice between the demands of its own interest in protecting its citizens and the demands of the Rule of Validation, rather than by an alleged adherence to so-called rules of conflict of laws based on irrelevant contacts of the contract.

emancipations under a peculiar exemption of such decrees from full faith and credit otherwise due to sister state judgments. *Beauchamp v. Bertig*, 90 Ark. 351, 119 S.W. 75 (1909); *Deason v. Jones*, 7 Cal. App. 2d 482, 45 P.2d 1025 (Dist. Ct. App. 1935). See generally EHRENZWEIG, *CONFLICT OF LAWS* 185-88 (1959).

